

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs May 19, 2009 at Knoxville

**DANNY JOHNSON v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Sequatchie County**  
**No. 8317    Buddy D. Perry, Judge**

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**No. M2008-02115-CCA-R3-PC - Filed December 9, 2009**

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The Petitioner, Danny Johnson, appeals as of right from the Sequatchie County Circuit Court's denial of his petition for post-conviction relief challenging his convictions for two counts of rape of a child and one count of aggravated sexual battery. The Petitioner alleges that he was denied his Sixth Amendment right to the effective assistance of counsel, specifically by trial counsel's failure to question a juror about his relationship with the prosecuting officer, failure to investigate the victim's receipt of funds through the victim's compensation fund, failure to object to jury instructions, failure to investigate whether the victim made similar allegations in Ohio, and failure to request a jury instruction on child abuse. Following an evidentiary hearing, the post-conviction court found that the Petitioner had failed to prove his allegations by clear and convincing evidence. Following our review, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Phillip A. Condra, District Public Defender; Mechelle Story and Jeffery Harmon, Assistant Public Defenders, attorneys for appellant, Danny Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Stephen Strain, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

**OPINION**

The record reflects that the Petitioner was convicted following a jury trial of two counts of rape of a child and one count of aggravated sexual battery for abuse he committed against an eight-year-old boy who was a neighbor's child. The trial court imposed sentences of twenty-one years for each rape of a child conviction and eight years for the aggravated sexual battery conviction, to be served concurrently, for a total effective sentence of twenty-one years. This court affirmed the

Petitioner's convictions and sentencing on direct appeal. State v. Danny Johnson, M2002-01239-CCA-R3-CD, 2003 WL 22999449 (Tenn. Crim. App. Apr. 22, 2003), app. denied (Tenn. May 10, 2004). On January 10, 2005, the Petitioner filed a timely pro se petition for post-conviction relief. Following the appointment of counsel and an amendment to the petition, an evidentiary hearing was held on November 1, 2007.

Lead counsel<sup>1</sup> testified that he met with the Petitioner "quite a bit" in preparation for trial, noting that the case actually went to trial twice when the first trial ended in a mistrial due to a hung jury. Although lead counsel could not recall interviewing a witness for whom the Petitioner had babysat and who had knowledge of the victim's reputation for lying, he stated that he interviewed several witnesses concerning the victim's credibility. He also recalled meeting with four medical professionals concerning the victim's injuries but stated that they were not called as defense witnesses "for obvious reasons." Lead counsel stated that he would normally discuss with the Petitioner the substance of any interviews with witnesses. He recalled that there was reference to the victim reporting a similar incident while the family lived in Ohio. He stated that an acquaintance of the victim's family testified regarding the report in Ohio. Lead counsel admitted that he did not object to the trial court's credibility instruction regarding this witness because he "thought it was proper instruction." He acknowledged that the defense team never investigated nor did the State disclose that the victim had received money through the victim's compensation fund. Regarding the Petitioner's allegation that one of the jurors had a familial relationship with one of the prosecuting officers, Ricky Smith, counsel could not recall Officer Smith was seated at the State's table during jury selection.

On cross-examination, lead counsel read a handwritten note sent by the Petitioner during the pendency of his direct appeal in which the Petitioner applauded the efforts of the defense team. Lead counsel also identified several memos to the file which were made exhibits to the evidentiary hearing and detailed the witness interviews and substance of each witness's testimony. Of particular note, lead counsel testified that each interview with the medical personnel produced no favorable evidence for the defense. At the Petitioner's request, lead counsel interviewed Royce Rollins who reported that she was dating the Petitioner at the time he purchased a video game system at a yard sale; the video game was allegedly used to lure the victim to the Petitioner's home. However, lead counsel testified that Ms. Rollins broke up with the Petitioner because the victim "was over there all the time" and that she would have contradicted the Petitioner's claim that he was never alone with the victim. The Petitioner had also claimed that the victim's parents were angry over a land deal with the Petitioner's mother that had fallen through a few weeks before the victim's report of the incident; however, lead counsel testified that the Petitioner's mother denied that the victim's parents were angry over the sale of the land. Lead counsel's notes also reflected that several witnesses would testify that the victim was often seen alone with the Petitioner, unaccompanied by his father, contrary to the Petitioner's claim. Lead counsel's notes also showed that, following the mistrial of the first trial, the Petitioner was offered a plea agreement whereby the Petitioner would enter a nolo

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<sup>1</sup> The Petitioner was represented at trial by a team of three attorneys. Only lead counsel testified at the evidentiary hearing.

contendere plea to attempted rape of a child and serve twelve years in custody. Despite lead counsel's recommendation that the Petitioner take the plea offer, the Petitioner proceeded to the second trial. Regarding jury selection, counsel testified that the Petitioner agreed with the selection of jurors and that they had reviewed the juror list "in detail" prior to jury selection.

The Petitioner testified counsel never told him about the interviews with the medical experts and the victim's character witnesses. He did recall discussing Ms. Royce's interview with counsel. He also acknowledged that counsel advised him to take the plea offer but that he insisted on going to trial. After his conviction, the Petitioner discovered that the victim had received the victim's compensation fund money but that was not investigated by or disclosed to counsel prior to trial. The Petitioner also testified that his attorneys failed to request a jury instruction on child abuse as a lesser included offense of rape of a child. He also could not recall whether his attorneys asked a juror about the juror's familial relationship Officer Smith. The Petitioner testified that counsel did not inquire about the nature of their relationship – how often they spent time together, whether they grew up together, or even if the juror could be fair given his familial relationship with Officer Smith.

Following the evidentiary hearing, the post-conviction court took the matter under advisement. The post-conviction court filed written findings of fact and conclusions of law, ultimately holding that the Petitioner had failed to prove his allegations by clear and convincing proof. The post-conviction court specifically found that the evidence reflected that counsel for the Petitioner were well prepared and that they had interviewed several of the Petitioner's suggested witnesses only to learn that they would not present favorable testimony. Likewise, the post-conviction court found that interviews of the medical personnel revealed no favorable information to present in the Petitioner's defense. Regarding the allegation of insufficient voir dire of the juror, the post-conviction court found that the Petitioner had failed to establish how he was prejudiced by the juror's presence on the jury. The post-conviction court found that while counsel did fail to request a lesser included offense charge of child abuse, in light of the Petitioner's conviction of the indicted offenses, this failure was not prejudicial to the Petitioner. The post-conviction court also found that the Petitioner failed to establish any prejudice from any of counsel's alleged failures in objections or cross-examination during the trial, given the overwhelming proof of guilt presented.

## ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance

was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

We agree with the post-conviction court that the Petitioner has failed to meet his burden of proof regarding his allegations of ineffective assistance of counsel. The record reflects that trial counsel were diligent in their efforts to investigate the case, interview witnesses, and conduct the trial. Any admitted shortcomings regarding requests for jury instructions or cross-examination of witnesses did not result in prejudice to the Petitioner. Notably, the Petitioner did not present the testimony of the alleged improper juror or Officer Smith to establish the nature of their familial relationship in an effort to establish his claim of ineffective assistance relative to jury selection. Accordingly, we conclude that the evidence supports the findings of the post-conviction court and the order denying post-conviction relief should be affirmed.

#### CONCLUSION

In consideration of the foregoing, the judgment of the post-conviction is affirmed.

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D. KELLY THOMAS, JR., JUDGE